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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

LEE OLIPHANT ET AL.,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

and

MOTION TO POSTPONE ARGUMENT IN CONLEY v. GIBSON, No. 7, OCTOBER TERM, 1957

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Negro firemen, on their own behalf and as representatives of the class of Negro firemen, pray that a writ of certiorari issue before judgment in the Court of Appeals to review the judgment in this case of the United States District Court for the Northern District of Ohio, Eastern Division.

Opinion Below

The opinion of the District Court is not yet reported. It is printed in Appendix A, *infra*, pp. 13 to 20.

Jurisdiction

The judgment of the United States District Court for the Northern District of Ohio, Eastern Division, was entered on October 1, 1957. Petitioners docketed their appeal in the Court of Appeals for the Sixth Circuit by filing their Notice of Appeal on October 1, 1957, and by filing the certified record from the District Court in the Court of Appeals on October 3, 1957. The jurisdiction of this Court to issue certiorari before judgment in the Court of Appeals is invoked under 28 U.S.C. 1254(1); the pendency in this Court of the related case of *Conley* v. *Gibson*, No. 7, October Term, 1957, warrants certiorari before judgment in accordance with the policy announced and pursued by this Court in *Brown* v. *Board of Education*, 344 U.S. 1.

Question Presented

Does the refusal by the Brotherhood of Locomotive Firemen and Enginemen to admit Negro firemen to membership because of their color deny such Negro firemen their rights under the Railway Labor Act and the Fifth Amendment to the Constitution to fair and equal representation by their exclusive statutory bargaining representative?

Statute Involved

The statute involved is the Railway Labor Act, 45 U.S.C. 151 et seq., pertinent provisions of which are set forth in Appendix B, *infra*, p. 20.

Statement

Petitioners, Negro firemen, brought this declaratory judgment action in the District Court for themselves and other Negro firemen similarly situated, challenging their exclusion from their statutory bargaining representative, the Brotherhood of Locomotive Firemen and Enginemen, whose Constitution limits its membership to persons "white born". Petitioners seek membership in the Brotherhood on the ground that the equal representation which the Brotherhood is legally obligated to provide them under the doctrine of *Steele* v. *Louisville & Nashville Railroad Company*, 323 U.S. 192, has not been accorded them as a matter of fact and cannot be accorded them as a matter of law as long as they are excluded from participation in the Brotherhood's bargaining deliberations and denied voice and vote in the selection of its bargaining officials.

Petitioners' case, as presented in their complaint and at the trial, was grounded on two alternative theories for relief:

First, that, kept separate and excluded, petitioners cannot as a matter of law enjoy the equality in the exercise of federally-created bargaining authority which the rule of the *Steele* case guarantees them, because representation, without voice or vote is inherently unequal representation, and

Second, whether or not exclusion is *inherently* irreconcilable with equal representation, petitioners should nevertheless be admitted to the Brotherhood because the evidence shows such consistent and continuous hostility and discrimination by the Brotherhood, that these petitioners cannot obtain equal representation as long as they are kept voiceless, voteless and excluded.

In order to meet their burden under the second theory,

petitioners called a number of Negro firemen as witnesses at the trial to testify to various forms of hostile discrimination and unfair treatment to which they have been subjected by the Brotherhood for decades.[1] Petitioners' proof demonstrated that for over fifty years the Brotherhood and its representatives have sought to eliminate Negro firemen from the railroads, to limit their employment rights, and to replace them with white Brotherhood members. Petitioners' witnesses produced evidence of continuing discrimination and hostility by the Brotherhood right down to the present day: special privileges recently accorded white firemen over Negroes (Tr. 163-167); white firemen regularly permitted to earn more pay than Negroes (Tr. 262); a bribe the Brotherhood offered so that a white fireman could take a Negro's job (Tr. 234-237); a white "swing man" recently added to a run to reduce the mileage of Negro firemen (Tr. 316-325). Each Negro witness testified that the Brotherhood has never once sought to inform him of proposed changes in his working conditions so as to enable him even to express his desires with respect to the conditions of employment. Probably the single most illustrative piece of evidence of the Brotherhood's continuing attitude towards its duty of representing Negro firemen was the testimony of a seventy-year old fireman on the Gulf, Mobile & Ohio Railroad. He related the statement made to him by the Brotherhood's General Chairman after Federal District Judge Mullins had entered a decree, pursuant to the *Steele* doctrine, protecting Negro firemen: "Judge Mullins gave it to you but I will sure as hell see you can't keep it" (Tr. 214).

[1] This Court has had several occasions to consider this record of discrimination and hostility. See *Steele* v. *Louisville & Nashville Railroad Company*, 323 U.S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210; *Graham* v. *Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232.

In the face of this evidence, the District Court could only find that petitioners' exclusion from the Brotherhood renders them unequal and subject to discrimination. The Court said: "*There is no question that the evidence presented establishes the fact that these plaintiffs and the members of their class are discriminated against in respect of their representation and participation; their conditions of employment and other matters relating to such employment.*" Nevertheless, the Court saw neither statutory nor constitutional authority to require admission of the plaintiffs into the Brotherhood. As concerns the Railway Labor Act the Court said, "that Congress did not intend to require admission of Negroes to membership is obvious." And as concerns the Fifth Amendment's due process guarantee, the Court found it inapplicable because "the certification of the Brotherhood of Locomotive Firemen and Enginemen as exclusive bargaining representative . . . is not sufficient to change the character of the organization from that of a private association to that of a governmental agency."

Although not denying that a statutory bargaining representative is sufficiently "governmental" in character to warrant judicial intervention against its discriminations (see *Steele*), the District Judge held that a statutory bargaining representative is not sufficiently "governmental" in character to warrant judicial intervention to secure full and equal representation through participation by all members of the craft or class represented. The District Judge attempted no justification for this distinction.

REASONS FOR GRANTING THE WRIT

I

Certiorari Is Sought Before Judgment in the Court of Appeals So That Important and Related Constitutional Issues May Be Considered by This Court at the Same Time.

Conley v. *Gibson*, No. 7, October Term, 1957, which is awaiting argument before this Court, raises a similar and related issue. In *Conley* the District Court dismissed a complaint which sought to enjoin compelled membership of Negroes in a segregated local as a violation of the union shop provision of the Railway Labor Act. Determination by this Court in *Conley* of the question of freedom of Negroes from compelled membership in a segregated local would doubtless bear heavily upon the question raised in petitioners' case of the right of Negroes to full membership. Conversely, a decision by this Court favorable to petitioners' plea for membership would be determinative of the more limited question in the *Conley* case of the union's right to compel inferior union status for Negroes. Moreover, while the *Conley* case presents a limited aspect of the issue of union membership for Negroes upon bare allegations in a complaint, petitioners' case presents the broader issue of full and equal membership rights for Negroes in the context of a trial on the merits where the discriminatory effects of exclusion were amply documented and where the District Court has found actual discrimination on the evidence presented.

In a situation where the constitutional issues involved were similar to those involved in *Conley* and the case at bar, this Court indicated that the public interest is served when important and related constitutional questions of first instance are heard and determined by this Court at one time. See *Brown* v. *Board of Education*, 344 U.S. 1. Certiorari before judgment in petitioners' case is thus amply

precedented and highly appropriate so that the related constitutional questions in petitioners' case and in *Conley* v. *Gibson* may be considered and determined by this Court at the same time.

II

The Decision Below Is in Conflict With the Applicable Decisions of This Court.

The District Court found that petitioners are being discriminated against in respect of their representation and participation in the formulations of their conditions of employment. Nevertheless, the Court denied relief on the ground that refusal of membership by the Brotherhood is not "Federal action", holding that "for injustices due to discrimination or inadequate representation and participation to employees who are not members of the bargaining agent, the employees must look to the legislative, not the judicial branch of constitutional government." This holding is in clear conflict with this Court's decisions in *Steele* v. *Louisville & Nashville Railroad Company*, 323 U.S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210; *Graham* v. *Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232; *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768; and *Syres* v. *Oil Workers*, 350 U.S. 892.[2] The District Court's

[2] In clear conflict with this Court's rule of constructional avoidance of constitutional doubts (see, e.g., *United States* v. *Rumely*, 345 U. S. 41) is the District Court's refusal to find implicit in the Railway Labor Act a prohibition on racial exclusion by the statutory representative. In giving weight to the Senate's rejection of a Railway Labor Act amendment proposed by Senator Jenner which would have prohibited racial exclusion by the statutory representative, the District Court overlooked the fact that the Senate Committee Report pending at that time (Senate Report No. 2263, 81st Congress, Second Session) specifically preserved the vitality of the doctrine in the *Steele* case, and that prior to that time that doctrine had already been construed by the Supreme Court of Kansas to preclude the practice of racial exclusion. See *Betts* v. *Easley*, 161 Kan. 459, 169 P. 2d 831.

holding that the Brotherhood's status as the certified exclusive statutory bargaining representative "is not sufficient to change the character of the organization from that of a private association to that of a governmental agency" is clearly contrary to the cited decisions.

It is true, of course, that petitioners do not seek to enjoin discriminatorily bargained contracts, as in *Steele*, but to obtain sufficient participation in the bargaining union to afford them equal treatment in the bargaining process before discriminations can be effected against them. But this difference is in no way material. Having found discrimination and exclusion, the District Court could not, and did not, justify any distinction between the case at bar and *Steele* which would render the Brotherhood a mere "private association" for the purposes of the relief sought here, whereas it was sufficiently "governmental" to warrant relief against its discrimination in *Steele*, *Tunstall* and *Graham*.[3]

III

Exclusion of Negroes From Membership in Labor Unions Presents A Question of Broad and Immediate National Significance in the Orderly Elimination of Discrimination and Segregation.

Racial exclusion is still practiced by some of the Nation's largest labor unions. The corrosive effect of racial segregation and exclusion by these powerful statutory bargaining representatives is not limited to the Negroes who are deprived of a voice in the determination of their rights,

[3] Nor can the decision below be supported by the dictum in the *Steele* case that the Railway Labor Act "does not deny to such a bargaining labor organization the right to determine eligibility to its membership." That dictum was not an approval by this Court of invidious *racial* exclusion by a statutory bargaining representative nor could such approval, had it been intended, have survived this Court's recent decisions that forced separation of the races is inherently unequal treatment.

nor to the whites who close the doors of the union hall to their Negro fellow workers; the racial exclusion practiced by these unions is a continuous threat to the elimination of segregation in public schools, public facilities, and other vital areas. The picture of a federally-certified labor union exercising federally-created bargaining power over excluded Negro employees is a constant reminder of federally-sanctioned second-class citizenship, wholly inconsistent and contrary to the necessary public acceptance of federal constitutional guarantees. A reversal of this picture through the accomplishment of labor union integration would be an important forward step in that very process of adjustment which this Court is seeking to insure by its "gradual" school-integration mandate.

Integration in the field of labor would advance public acceptance of integration in other areas of community life where, unlike the situation found in the labor movement, the races have not previously had such regular daily contacts and common interests. Negro firemen in the South have always worked side by side with white firemen and engineers with remarkably little personal hostility or antagonism. What we have here are whites and Negroes who work together, eat together, go on strike together, and share those personal ties which render the continued exclusion of the Negroes from the Brotherhood and the election of its bargaining officers a cruel and corrosive vestige of a bygone era.[4]

An authoritative determination by this Court that statutory bargaining representatives may not exclude Negroes from membership would at once eliminate an ugly racial

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[4] Continuing exclusion of Negroes is rendered all the more anomolous by the fact that it is practiced primarily by large national unions neither controlled nor dominated by Southern members, and defended on no better grounds than the antiquity of the racial barrier in the union's Constitution.

practice carried on under federal auspices, and at the same time carry forward the program of gradual integration by demonstrating the ability of whites and Negroes to carry on constructive common activity in an integrated union hall.

Conclusion

For the foregoing reasons, it is respectfully urged that the Court grant certiorari before judgment to determine the vital issue here involved.

Respectfully submitted,

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For the reasons stated in their petition for certiorari, petitioners move that argument in the case of *Conley* v. *Gibson*, No. 7, October Term, 1957, be postponed until the Court shall have acted upon the petition for certiorari in the instant case.

This motion and the petition for certiorari before judgment are predicated upon this Court's action in *Brown* v. *Board of Education*, 344 U.S. 1, wherein certiorari before judgment was invited and granted, and pending cases were continued, so that important and related constitutional questions might be heard by this Court at one time.

The grounds for certiorari before judgment, which are also the basis for this motion, are set forth in the petition for certiorari. It is pointed out there that *Conley* raises a similar and related constitutional issue. In *Conley*, the District Court dismissed a complaint which sought to enjoin compelled membership of Negroes in a segregated local as a violation of the union shop provision of the Railway Labor Act. Determination by this Court in *Conley*

of the question of freedom of Negroes from compelled membership in a segregated local would doubtless bear heavily upon the question raised in petitioners' case of the right of Negroes to full membership. Conversely, a decision by this Court favorable to petitioners' plea for membership would be determinative of the more limited question in the *Conley* case of the union's right to compel inferior union status for Negroes. Moreover, while the *Conley* case presents a limited aspect of the issue of union membership for Negroes upon bare allegations in a complaint, petitioners' case presents the broader issue of full and equal membership rights for Negroes in the context of a trial on the merits where the discriminatory effects of exclusion were amply documented and where the District Court has found actual discrimination on the evidence presented.

Petitioners believe that the situation presented is in all respects like that in *Brown* v. *Board of Education*, 344 U.S. 1, where this Court invited and granted certiorari before judgment, postponing argument on pending cases, so that important and related constitutional questions of first instance might be argued and decided at one time. Petitioners believe that should this Court find their petition for certiorari meritorious, it will desire to hear argument in the instant case at the same time as the argument in the *Conley* case. It is therefore respectfully requested that argument in the *Conley* case be postponed until this Court shall have determined whether or not to grant certiorari herein.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Civil No. 31464

LEE OLIPHANT ET AL.,

Plaintiffs,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN ET AL.,

Defendants

Memorandum Opinion

JONES, J.:

This is an action brought by several Negro firemen employed by various southern railroads seeking an order from this court compelling the Brotherhood of Locomotive Firemen and Enginemen to admit them to membership. The Brotherhood has been certified as exclusive bargaining representative for these men, but the constitution of the Brotherhood forbids the admission of Negroes to membership. It is the plaintiffs' position that the Brotherhood has never represented the Negro workers on equal terms with the white workers, that the United States Supreme Court in Steele v. Louisville and Nashville R.R., 323 U.S. 192, recognized at least one instance of this unequal treatment and ordered the Brotherhood to cease this discrimination, and that the Brotherhood continues to exercise discrimination in its representation, particularly in (1) reducing the minimum mileage requirements for firemen, which has the effect of reducing the monthly income of the Negroes; (2) applying the "gouge" rule in such a way as to reduce earnings of the Negroes; (3) applying the mileage rules to firemen and not to demoted engineers; and (4) bargaining for

a compulsory retirement at age 70. For reasons which shall appear later, these alleged acts of discrimination will not be discussed in detail, but it should be noted that as to (3) above, proof was mainly in the form of opinion and was denied by Brotherhood officials, while (1), (2) and (4) are legitimate practices used by most unions for reasons other than discrimination, and since they apply to all who come within the terms of the rule involved, whether the individuals are white or colored, this court cannot state definitely that this Brotherhood adopted these practices for the purpose of discrimination against the Negroes. It should be further noted that it is clear that all the alleged unequal treatment which has resulted in years of litigation between the Negro firemen and the Brotherhood was made necessary by the longstanding rule of the railroads that engineers must have three years experience as firemen, and the further rule that Negroes may not become engineers. Thus, after a time, the Negro firemen had become the senior firemen, having the right to choice runs, and all the other seniority rights, and it became difficult for the railroads to train prospective engineers. The attempts by the railroads and the Brotherhood to train a sufficient supply of competent engineers are the alleged acts of discrimination involved in this case and in the Steele case, supra. The basic act of discrimination, from which all the others necessarily followed, was the rule, of the railroads that Negroes may not become engineers. Yet when the Brotherhood in 1948 attempted to remove this obstacle of non-promotability, two suits, Palmer v. Southern Railway, et al., U.S.D.C. at Washington, D.C., and Salvant v. Louisville and Nashville R.R., et al., U.S.D.C. at Louisville, Ky., were brought to enjoin any such attempt by the Brotherhood to render Negro firemen subject to the same rules of promotion as were white firemen. These cases, along with many others were settled together, one of the conditions of the settlement

being the agreement of the Brotherhood that it would not attempt to make firemen eligible as engineers. A very interesting history of this whole problem is to be found in Rolax v. Atlantic Coast Line R.R., et al., 91 F. Supp. 585, and another treatment in 1953 Wisconsin Law Review 516.

In the view I take of the issues for consideration, the factual questions respecting inequality, discriminati , and other related complaints presented in evidence have no bearing upon the single question to be resolved.

The essential facts are that the plaintiffs are not eligible to membership in the defendant as exclusive bargaining agent for the class to which they belong and that the Congress has made no provision in the Railway Labor Act requiring that membership in the exclusive bargaining agent be made available to all employees of the class regardless of race or color.

It is the plaintiffs' claim that Congress having made no provision therefor, this court, sitting in equity, has the power to compel what the Congress has failed to provide. There is no question that the evidence presented establishes the fact that these plaintiffs and the members of their class are discriminated against in respect of their representation and participation; their conditions of employment, and other matters relating to such employment.

The plaintiffs claim that the fact that membership in the defendant organization is not available to them because they are not white-born is the principal reason why they do not receive equal consideration, treatment and service by the defendant as bargaining agent for the employees of the railroad where these plaintiffs and their class are employed; that they are controlled and ostensibly represented by the defendant as bargaining agent without real participation, or without participation in any effective degree, such as are the members of the defendant brotherhood.

There can be no real assurance that membership in the defendant would prevent discrimination, since it is my opinion under the evidence here that the effective discrimination is by the railroad employer, rather than the brotherhood, and the railroad employers are not parties to the action.

In detail, plaintiffs in this action seek an order compelling the defendant Brotherhood and its officers to admit plaintiffs to membership privileges in the Brotherhood. They base their right to such relief upon the doctrine of Steele v. L. & N. R. R., supra, to the effect that the Brotherhood must afford representation to members and non-members equally and without regard to race or color; upon the principle of Brown v. Board of Education, 347 U.S. 483, that the maintenance of segregated public schools by states denies the equal protection of the laws to their citizens; upon the pronouncement of Bolling v. Sharpe, 347 U.S. 497, that the due process clause of the Fifth Amendment is comparable to the equal protection clause of the Fourteenth Amendment; and upon a showing of actual discriminatory representation by the Brotherhood. They claim that the remedy granted in the Steele case is not adequate and that the privileges of membership are necessary to enable them to achieve equality of representation.

It is true, as defendants suggest, that the school segregation cases were based upon the equal protection clause of the Fourteenth Amendment, which is a limitation on state action, and that the Fifth Amendment, which is the comparable limitation on Federal action, contains no such clause. However, the case of Bolling v. Sharpe, supra, stands for the proposition that segregated schooling deprives the Negro (and the white) of liberty without due process of law.

From this it appears that if Federal action is responsible for discriminatory practices in labor relations, and such discrimination deprives citizens of life, liberty, or property, without due process of law, then such Federal action is repugnant to the Constitution.

The state action involved in the school cases was the maintenance by the state of segregated public schools. The Federal action involved in this case is the certification of a labor union as exclusive bargaining representative. Obviously it is not Congress which requires that Negroes be denied membership in the union, but the union itself. The question involved here is whether Congress should require the admission of Negroes to membership in unions which are certified as exclusive bargaining agent.

That Congress did not intend to require admission of Negroes to membership is obvious. It is impossible to interpret the legislative intent in this situation in such a manner as to avoid the constitutional question. When the union shop amendment to the Railway Labor Act, 45 U.S.C. Sections 151 et seq., was being discussed and considered by Congress, Senator Jenner of Indiana proposed an amendment which provided that railway labor organizations which denied membership on the basis of race or color would be refused certification as exclusive bargaining representative so long as such conditions were enforced. (Pp. 16536, 16537, 17241, Congressional Record, 81st Congress, 2nd Session). This proposed amendment was tabled. The Act itself is silent on the subject. Thus, if the due process clause guarantees the right to membership without regard to race or color in a labor organization which is certified as exclusive bargaining representative, then certifications of unions which do deny membership on this basis must be declared invalid.

Missouri ex rel. Gaines v. Canada, 305 U.S. 337, which

was decided under the old "separate but equal" doctrine of Plessy v. Ferguson, 163 U.S. 537, declared that if separate facilities for Negroes were not in fact equal, then colored students students must be admitted to white schools. Thus, maintain the plaintiffs, if actual unequal representation is shown in this case, then the court under the Gaines case may order this Brotherhood to admit these plaintiffs to membership, without declaring that all Negroes must be admitted to membership in all exclusive bargaining representatives. However, if the school cases are analogous to this situation, the newer Brown doctrine of "separate cannot be equal" must control here as well. If membership in the certified representative is necessary to insure that the Negro firemen will not be deprived of life, liberty, or property without due process of law, then the presence or absence of actual unequal treatment by the representative is immaterial, just as the existence of separate schools, regardless of equality or inequality of facilities and standards, denies to citizens the equal protection of the laws.

"The real question is whether Federal action has deprived these Negro citizens of liberty or property without due process of law. It is the considered judgment of this court, without dealing with the question of whether the alleged right to become a member of a labor organization certified as exclusive bargaining representative is concerned with liberty or property, that sufficient Federal action is not shown to enable the courts to declare the Railway Labor Act, or any part thereof, an unconstitutional deprivation of liberty or property. The purpose of the Act was and is to promote industrial peace. Apparently the Act itself would not have been acceptable to the Congress if Negro membership in the agent had been required. In short, the representatives of all the people could not agree that any control over the membership policies of the agents cer-

tified was essential to the major purpose of the Act. However, expedience does not remove the taint of unconstitutionality, if such there be.

As is mentioned above, the Federal action taken by an agency of the Congress, was the certification of the Brotherhood of Locomotive Firemen and Enginemen as exclusive bargaining representative for the bargaining unit involved, which included persons who were not acceptable to membership under the Constitution of the Brotherhood. Actions by the Brotherhood can be attributed to the Congress only if the act of certification clothes the Brotherhood with some or all of the attributes of a Federal agency. The court is satisfied that this act is not sufficient to change the character of the organization from that of a private association to that of a governmental agency.

The court can feel that a situation is unjust and may need some remedial action, but unless upon sound equitable principles relief can be granted, the remedy does not lie with the courts. Certainly voluntary action by the defendant or Congressional legislation present the only corrective where a manifest inequality exists. It is pressed upon me that trends and policy with respect to rights not hitherto receiving adequate legislative sanction and security give support and direction to judicial mandate for the accomplishment of the plaintiffs' prayer and purpose here. But I cannot accept such a representation as valid without legislative action. To compel by judicial mandate membership in voluntary organizations where the Congress has knowingly and expressly permitted the bargaining agent to prescribe its own qualifications for membership would be usurping the legislative function. The Congress has entered the field of, and made provision for, labor relations and furnished means of adjusting labor disputes between employers and employees of interstate railways. For in-

justices due to discrimination or inadequate representation and participation to employees who are not members of the bargaining agent, the employees must look to the legislative, not the judicial branch of constitutional government.

Accordingly, for the reason that there is not sufficient Federal action to render the membership policies of this Brotherhood subject to judicial control, plaintiffs must be denied the relief requested.

This memorandum is considered compliance with Rule 52(a).

PAUL JONES,
United States District Judge.

SEPTEMBER 27, 1957.

APPENDIX B

45 U.S.C. § 151.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

* * * * * * *

45 U.S.C. § 152.

Second. All disputes between a carrier or carriers and its or their employees shall be considered and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the

designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transporta-

tion to its employees while engaged in the business of a labor organization.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice; *And Provided Further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to

represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

LEE OLIPHANT ET AL.,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN ET AL.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM OF PETITIONERS

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IN THE

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Respondents' principal argument in opposition to certiorari (Opp., p. 9) appears to be that "Petitioners' Right to Become Members of the Brotherhood, If They Have Such Right, Must Be the Fifth Amendment" rather than the Railway Labor Act. But certainly certiorari is not rendered inappropriate simply because the question presented is constitutional rather than statutory. Petitioners had thought they were following the mandate of this Court in seeking to construe the Railway Labor Act so as to avoid the necessity for constitutional adjudication. But if, as respond-

ents claim, constructional avoidance of the constitutional question should prove impossible here, the grant of certiorari is not thereby rendered less appropriate.*

Respondents also renew the argument made below that petitioners would not benefit from membership because the Brotherhood's bargaining officials are unresponsive to the will of their members. They argue that "members of the Brotherhood do *not* determine Brotherhood policy or decide upon its collective bargaining objectives. The officers responsible for such matters arrive at their own decisions, uncontrolled by any form of direct dictation from the membership" (Opp., p. 7). It may, of course, be that undemocratic practices of the union will render petitioners' membership in the Brotherhood less valuable than hoped, but this hardly excuses denial of the right altogether. Racial exclusion cannot be justified by the circumstance that, once admitted, the Brotherhood will refuse petitioners effective control over the Brotherhood's bargaining decisions not because they are Negroes, but because the bargaining officials do not heed the expressed desires of the membership. Indeed, the Brotherhood's insistence that its bargaining officials determine bargaining objectives uncontrolled by any direct dictation from the membership defeats their argument; for if the respondents' claims of benevolent union paternalism by the bargaining officials are correct, exclusion of Negroes from the election of those bargaining officials is thereby rendered a prima facie de-

* In footnote 6 of the Brief in Opposition, respondents assert that petitioners are unjustified in stating that respondent is the "certified" representative of firemen, including petitioners. Of course, whether "certified" or merely "designated", as long as the Brotherhood acts as the exclusive statutory representative for firemen, it is prohibited from denying petitioners equal representation. But, as a matter of actual fact, the Brotherhood is a "certified" representative for petitioners and the District Judge specifically so found in the second sentence of his opinion (Pet., p. 13).

privation of all voice in the determination of their working conditions.

As a matter of fact, however, the Brotherhood's assertion of paternalism is contrary to its own judicial admissions below. Members of the Brotherhood, unlike excluded Negroes, may take part in the deliberations which form the basis of bargaining negotiations and demands for changes in working conditions. Petitioners' inequality in representation because of their exclusion from the Brotherhood's deliberations, in which Brotherhood members are given a voice, is clearly illustrated in the respondents' answers to six interrogatories propounded prior to trial, which have been included as Appendix A herein for the information of this Court.

Having shown racial exclusion from voice or vote in the election of their bargaining representatives and the formulation of their working conditions, petitioners have made their case for membership without more. But, in further illustration of the inequality flowing from their exclusion, petitioners went on to prove various forms of racial discrimination fostered by the Brotherhood in respect to specific working conditions. In an effort to avoid the impact of this further line of proof, respondents point to the District Judge's statement that "effective discrimination is by the railway employer, rather than by the Brotherhood." But respondents appear to concede (see Opp., pp. 4-5), as they must, that the discrimination of which the Judge was there speaking was the discrimination "which has resulted in years of litigation between the Negro firemen and the Brotherhood," to wit, discriminations based on the nonpromotability of Negro firemen which this Court struck down in *Steele*, *Tunstall* and *Graham*. The District Judge most definitely did not find that the voluminous evidence of other discriminations by respondents against peti-

tioners was attributable to the railroads; on the contrary he was clearly referring to the Brotherhood's conduct when he stated that "these plaintiffs and members of their class are discriminated against in respect to their representation and participation; their conditions of employment and other matters relating to their employment."

The grant of certiorari at this time is rendered peculiarly appropriate by the pendency of the *Conley* case, where this Court has under consideration the practices of a racially segregated union. Petitioners' case provides the factual and legal materials necessary for this Court's advised determination whether Negro employees can be found to be receiving fair and equal representation in accordance with the Railway Labor Act and the Constitution, when they are kept excluded, voteless and voiceless by their statutory bargaining representative. Respondents appear to assume (Opp., p. 14) that since the *Conley* case has been argued, it is no longer under active consideration by this Court. But this Court frequently considers two cases together even though argued at different times. Joint consideration is appropriate here in the light of the compelling reasons presented for contemporaneous determination of petitioners' case and that of *Conley* v. *Gibson*.

It is respectfully submitted that the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Defendants' Answers to Plaintiffs' Interrogatories 1 Through 6 (Tr. 92-95)

Interrogatory 1. "Do the monthly or quarterly reports made by the General Chairmen of the Brotherhood of Locomotive Firemen and Enginemen, et al., (hereinafter referred to as the Brotherhood) referred to in Paragraph 14 of the Third Defense of Defendants' Answer, contain information about movements to bring about changes in the governing agreement between the Brotherhood and the carrier, or about negotiations with the carrier in connection with changes in the agreement, or about the formal notices with respect to such changes required by Section 6 of the Railway Labor Act?"

Answer 1: "While the Constitution of the Brotherhood requires General Chairmen to make monthly or quarterly reports to lodges and Local Chairmen under their jurisdiction, of work performed by them, the Constitution does not prescribe the form of such reports. Most General Chairmen include in their reports information about demands served upon railroads for agreements on new matters and changes in the existing collective agreement, served under Section 6 of the Railway Labor Act, and also information regarding the progressing of such demands in collective bargaining."

Interrogatory 2: "Are the monthly or quarterly reports described in Interogatory 1 readily available to firemen, hostlers, and hostler helpers (hereinafter referred to as firemen) not members of the Brotherhood?"

Answer to 2: "No."

Interrogatory No. 3: "What other means are used to inform members of the Brotherhood of matters of interest to them relating to their wages, hours or other working conditions?"

Answer to 3: "The President of the Brotherhood is required by the Constitution of the Brotherhood to issue monthly bulletins or circulars to other Grand Lodge officers, recording secretaries of lodges, legislative representa-

tives, General and Local Chairmen, and Secretaries of General Grievance Committees, of the work of collective bargaining conducted by the Brotherhood on a national or regional scale, and of other matters of interest to the membership as a whole. The Brotherhood also publishes and distributes to its members a monthly magazine."

Interrogatory 4: "Are the sources of information described in answer to Interrogatory 3 readily available to firemen not members of the Brotherhood?"

Answer to 4: "No."

Interrogatory 5: "Which of the following matters of interest to firemen are reported upon or otherwise discussed at meetings of the Local Lodges of the Brotherhood: negotiations with the carrier regarding changes in the governing agreement, dec ons in time claims and grievances cases which may be of general applicability, assignments of runs and possible or impending changes in assignment of runs, the set-up of pools, and the choice of relief points?"

Answer to 5: "Matters of general interest to locomotive firemen are discussed at meetings of Local Lodges, including reports of negotiations with carriers regarding changes in the governing agreement, decisions on time claims and grievance cases, assignments of runs and possible or impending changes in assignment of runs, the set-up of pools, etc."

Interrogatory 6: "Can firemen who are not members of the Brotherhood attend meetings of the Local Lodges?"

Answer to 6: "No."

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Respondents.

BRIEF OF RESPONDENTS
In Opposition to Petition for Writ of Certiorari

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BRIEF OF RESPONDENTS
In Opposition to Petition for Writ of Certiorari

QUESTION PRESENTED.

The question presented by this action is not, we believe, correctly stated in the petition for writ of certiorari. In stating the question according to the respondents' understanding of the case, the following facts are relevant:

The 1934 amendments to the Railway Labor Act contain this provision:

> "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."[1]

And the term "representative" is defined as follows:

> "The term 'representative' means any *person or persons, labor union, organization,* or *corporation* designated either by a carrier or group of carriers or by its or their employees, to act for it or them." (Emphasis ours.)[2]

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[1] 45 U. S. C. Sec. 152, Fourth.

[2] 45 U. S. C. Sec. 151, Sixth.

The Congress did *not* incorporate in the Railway Labor Act a provision requiring a labor organization, if selected by the majority of a craft to be the craft representative, to accept all employees within the craft as members of the organization or otherwise restrict the prior right of such organization under the common law to prescribe its own qualifications for membership.

With this statutory background, the question presented by this action is, we believe, properly stated as follows: Did the Congress, when enacting the 1934 amendments to the Railway Labor Act, deprive Negro firemen of a right guaranteed by the Fifth Amendment when it omitted from the Act a prohibition against labor organizations prescribing membership requirements along racial lines?[1]

STATEMENT OF THE CASE.

The Charge That the Brotherhood Commits Acts of Discrimination of a Hostile Nature Affecting the Employment Rights of Negro Firemen.

Little needs to be said in answer to the charge made by the petitioners that the Brotherhood indulges in hostile discrimination against Negro firemen in connection with their employment rights.

This Court will recall that by its decisions in *Steele v. L. & N. R. R.*, 323 U. S. 192, *Tunstall v. BLF&E*, 323 U. S. 214, and *Graham v. BLF&E*, 338 U. S. 232, this Court con-

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[1] The current constitution of the Brotherhood requires that the following conditions, among others, be met by applicants for membership:

"He shall be white born, of good moral character, sober and industrious, not less than sixteen (16) years of age, and be able to read and write the English language and understand our constitution. Mexicans, or those of Spanish-Mexican extraction are not eligible."

demned as a product of hostile discrimination the Southeastern Carriers' Conference Agreement of February 18, 1941, upon the strength of the allegations contained in the Negro firemen's complaints.

Thereafter, for the first and only time, the Brotherhood and a southeastern railroad undertook to provide a Federal court, through the testimony of live witnesses in open court, with an understanding of the actual railroad operating conditions that led to the making of the Southeastern Agreement. This occurred in the case entitled *Rolax v. Atlantic Coast Line Railroad, et al.*, 91 F. Supp. 585. District Judge Hutcheson found the facts to be other than as charged by the Negro firemen in their complaint, but on appeal the Court of Appeals for the Fourth Circuit reversed the judgment below without regard for the District Court's findings but solely on the ground that the Southeastern Agreement of February 18, 1941, had already been declared invalid by the decisions of this Court in the *Tunstall*, *Steele* and *Graham* cases. (186 F. 2d 473.)

The ultimate outcome of the litigation launched by the Negro firemen had thus been made apparent to all concerned, with the result that the Brotherhood, late in 1951, entered into settlement negotiations with the Negro organizations and brought to an end the eleven suits then pending. In these settlements the Brotherhood agreed that it, its officers, agents and employees, would consent to be permanently enjoined from enforcing any agreement or any practice that discriminates in an unlawful manner against Negroes employed as locomotive firemen. (See defendants' Exhibits "G" and "H.")

These are the conditions under which the Brotherhood is now functioning as the representative of the firemen's crafts on the southeastern railroads where Negro firemen are employed.

At the trial of the instant case the petitioners' witnesses gave testimony regarding four current situations which petitioners contend constitute acts of hostile discrimination against the Negro firemen. Regarding these alleged acts of discrimination, District Judge Jones made the following finding in his opinion:

> "It is the plaintiffs' position * * * that the Brotherhood continues to exercise discrimination in its representation, particularly in (1) reducing the minimum mileage requirements for firemen, which has the effect of reducing the monthly income of the negroes; (2) applying the 'gouge' rule in such a way as to reduce earnings of the negroes; (3) applying the mileage rules to firemen and not to demoted engineers; and (4) bargaining for a compulsory retirement at age 70. For reasons which shall appear later, these alleged acts of discrimination will not be discussed in detail, but it should be noted that as to (3) above, proof was mainly in the form of opinion and was denied by Brotherhood officials, while (1), (2) and (4) are legitimate practices used by most unions for reasons other than discrimination, and since they apply to all who come within the terms of the rule involved, whether the individuals are white or colored, this court cannot state definitely that this Brotherhood adopted these practices for the purpose of discrimination against the negroes."

District Judge Jones then made these further observations regarding conditions on the southeastern railroads which are at the bottom of the Negro firemen's complaints that they are being discriminated against:

> "It should be further noted that it is clear that all the alleged unequal treatment which has resulted in years of litigation between the negro firemen and the Brotherhood was made necessary by the longstanding rule of the railroads that engineers must have three

years experience as firemen, and the further rule that negroes may not become engineers." * * *

"There can be no real assurance that membership in the defendant would prevent discrimination, since it is my opinion under the evidence here that the effective discrimination is by the railroad employer, rather than by the Brotherhood, and the railroad employers are not parties to the action."

These statements are to be deemed findings made by the District Court in keeping with the requirements of Rule 52, following five days of testimony and argument in open court.

Notwithstanding the foregoing, the petitioners would have this Court believe that the District Judge found the fact to be that the employment rights of Negro firemen are not the same as those of white firemen because of discriminatory tactics engaged in by the Brotherhood. (Petition for Writ, pages 4 and 5.) To accomplish this, petitioners quote the following statement from Judge Jones' opinion:

"There is no question that the evidence presented establishes the fact that these plaintiffs and the members of their class are discriminated against in respect of their representation and participation; their condition of employment and other matters relating to their employment."

If the District Judge intended this statement to be a finding that the *Brotherhood* is responsible for the Negro firemen having employment rights differing in any respect from the employment rights of the white firemen, these respondents simply fail to understand the memorandum opinion.

Petitioners Contend that Their Inability to Qualify for Membership in the Brotherhood Deprives Them of Valuable Privileges.

It must be assumed that the Congress knew, because of the broad definition which it gave to the term "representative" as incorporated in the Railway Labor Act, that a majority of the employees comprising a craft or class will sometimes select a person, or a committee of persons, to be their representative. More often, however, a craft or class of employees selects a labor union to be the craft representative. When a labor union is the craft representative, basic rights guaranteed by the Fifth Amendment are violated, the petitioners contend, if membership in the union is restricted along racial lines.

In attempting to demonstrate the importance to the individual employee of holding membership in the Brotherhood when it is selected to be the craft representative, the petitioners represented in their complaint that the Negro firemen are placed virtually in a state of isolation when compared with the privileges that membership brings to the firemen who are members of the Brotherhood. The complaint asserts that only members of the Brotherhood are provided with copies of the collective agreements, that the members assembled at lodge meetings decide what the Brotherhood policies and its collective bargaining objectives shall be, and that members are kept informed regarding the progress of collective bargaining objectives. The petitioners assert in their complaint that time claims and grievances are handled for members of the Brotherhood, in conferences with management and before the National Railroad Adjustment Board, whereas Negro firemen are without such services.

All of these representations are substantially incorrect, as the record clearly discloses. The facts are that printing and distributing the collective agreements are

tasks assumed by the management on almost all railroads. Every fireman is entitled to a copy of the agreement, and to receive it he has only to make a request to the proper railroad official (Tr. 390-392, 503). Between printings of the collective agreement, new agreements are customarily posted by the management on bulletin boards for all employees to read (Tr. 504).

Members of the Brotherhood do *not* determine Brotherhood policy or decide upon its collective bargaining objectives. The officers responsible for such matters arrive at their own decisions, uncontrolled by any form of direct dictation from the membership (Tr. 480). The members are not advised of collective bargaining objectives or of collective bargaining progress (Tr. 479). Collective bargaining for the purpose of establishing rates of pay, rules, and working conditions is conducted, to an increasing extent, on a national or regional scale, and the results of these efforts, together with reports on other subjects of general interest to the membership, are reported each month in detail in the Brotherhood's Magazine and also to some extent in a weekly newspaper called "Labor," published by a group of labor organizations, including the Brotherhood. The Magazine and "Labor" are available to every Negro fireman and to every other non-member fireman who desires the same, at a nominal subscription rate (Tr. 380-382, Defendants' Exhibits "M" and "N").

In respect to the handling of time claims and grievances, the Brotherhood's local chairmen and general chairmen represent Negro claimants and Brotherhood members without any distinction between them. The Negro has only to make a request for representation and submit a claim having merit for it to be handled (Tr. 296, 506-507, 560). The exhibits of record leave no room for dispute on this subject (Defendants' Exhibits "P" and "R"). It should be obvious that the Brotherhood would be defeating its own

best interests if it were to let a violation of the schedule agreement go uncorrected, regardless of whether a member or a non-member is affected by the violation.

Once in each four years members of the Brotherhood assemble in local lodge meetings to elect local lodge officers. If Negro firemen were members, they would, of course, be entitled to participate in elections at the local lodge level (Plaintiffs' Exhibit "1," pp. 128, 139, and 148).

The foregoing facts need to be understood before a court can appraise the practical importance of the right to membership which the petitioners assert is a right guaranteed them by the Fifth Amendment to the Constitution.

An indication of the extent to which non-membership in the Brotherhood has had a favorable or detrimental effect on the relative position occupied by the Negro firemen in comparison with other railway employees is disclosed by the following facts.

The Negroes are a small minority group occupying the top seniority positions in the firemen's craft on the seniority districts where they are employed. Their employment is steady, and they are virtually guaranteed employment for life by the firemen's collective agreements. The earnings of the Negro firemen average between $6,500 and $7,500 per year (Tr. 527). The responsibilities they must assume are a minimum among engine- and train-service employees inasmuch as they are not obliged to prepare for and assume the far greater responsibilities of engineers. (Defendants' Exhibits "G" and "H.") It is no exaggeration to say that probably no group of craftsmen employed in any American industry occupy more favorable employment status in terms of high pay, guaranteed employment, desirable employment conditions, and a minimum responsibility, than do the Negro firemen employed on the southeastern railroads.

ARGUMENT.

The Source of the Petitioners' Right to Become Members of the Brotherhood, If They Have Such Right, Must Be the Fifth Amendment.

The petitioners assert that Negro firemen employed on the southeastern railroads are being subjected, in connection with their employment rights, to acts of hostile discrimination by the Brotherhood. Because of this situation, the petitioners contend, they are entitled to protection from a court of equity in the form of an injunction prohibiting the officers of the Brotherhood from observing or enforcing the requirement of the Brotherhood's constitution that membership in the organization be restricted to persons of the white race.

The respondents challenge this contention, not only because the record negatives the charge of discrimination, but also because if the petitioners have a legal right to have the doors of membership opened to them, such right must exist independent of and regardless of what the facts may be with respect to the alleged discrimination. The Court's attention is invited to the following considerations.

The evidence presented to the District Court establishes beyond any possibility of serious argument that the Negro firemen's current grievances are not the result of discriminatory tactics on the part of the Brotherhood, but are merely grumblings against agreements which the Negro firemen dislike in exactly the same manner that many senior white firemen dislike and complain about them[1] (Tr. 405, 420, 555, 556).

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[1] For example, there are a total of 125 Negroes employed as firemen on the Louisville & Nashville Railroad. The L. & N. Railroad is divided into twenty seniority districts. These 125 Negroes are employed on only four seniority districts, whereas only white firemen are employed on the other sixteen seniority districts. The agreements and mileage regulations against which the Negroes complain are enforced on all of the districts comprising the L. & N. Railroad.

The senior white and Negro firemen are, by reason of their age and superior seniority, at the peak of their employment opportunities. The years of employment left to them are relatively few. They want to be free to earn all of the mileage that they are physically able to work. If they were not restrained by rigid mileage regulations, they would "hog" (Tr. 519) the available mileage at the expense of the men on the lower end of the seniority rosters, with the result that more firemen would be furloughed and walking the streets looking for work than now are.

Because the railway industry is an industry of shrinking employment, caused primarily by technological developments,[1] the Brotherhood adopted at its last convention, held in 1953, a national policy of spreading the available work in the firemen's craft among as many firemen employees as is practicable (Tr. 404).

The agreements that tend to carry out this policy are the agreements against which the Negroes are complaining. But these agreements are of general applicability and are enforced alike on all seniority districts. *The Negro firemen have as much, and as little, reason to complain about this humane policy as do the senior white firemen, and the latter's complaints are many* (Tr. 405, 420, 555, 556).

A second reason why the petitioners' charge of discrimination should have no bearing upon the success of this action is that this Court has already defined the judicial remedy available to employees when subjected to hostile discrimination by their statutory agent while act-

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[1] The peak peace-time employment in the railway industry once reached two million jobs. It is now less than one million jobs. In the past ten years, 30,000 firemen's jobs have disappeared from the railroads. (Tr. 403.) On the Louisville and Nashville Railroad alone, 600 firing jobs have been lost because of the superior power and efficiency of the Diesel locomotive over the steam locomotive. (Tr. 530.)

ing pursuant to the Railway Labor Act. The *Steele* and *Tunstall* decisions laid down this formula.

Access to this remedy has been augmented for the petitioners and those whom they represent, by the Brotherhood's submission to permanent injunctions which enjoin it from committing any form of hostile discrimination against the Negro firemen in connection with their employment rights. (Defendants' Exhibits "G" and "H.")

An additional reason, the respondents believe, why discrimination should have no bearing upon the petitioners' right of action, if a right exists, is that such cause of action must surely be founded upon some right protected by the Constitution.

The petitioners assert that they have a legal right to become members of the Brotherhood. No authority need be offered in support of the statement that the common law has always recognized the right of a voluntary association to adopt any conditions it might choose in specifying who may, or may not, become members of the association. The Brotherhood is, of course, a voluntary association.

The respondents are not aware of any attempt having been made by the Congress to change the common law in this respect. There is no language to be found in the Railway Labor Act, or, for that matter, in the National Labor Relations Act, suggesting that the Congress intended to legislate upon this subject. Indeed, the legislative history establishes beyond argument that the subject was considered by the Congress but was omitted from the Acts.

It must, therefore, follow that if the petitioners are entitled to an injunction ordering the Brotherhood to accept them into membership, it is because they are asserting some right that is protected by the Fifth Amend-

ment.[6] What this right is, the respondents do not profess to know, but if it exists it is obviously a right which the Congress should have taken account of when it enacted the Railway Labor Act, but neglected to do so. And it would seem that the enforcement of this right would *not* turn upon the question whether in a particular instance a labor union has been faithful or unfaithful in its representation of a craft or group of employees while discharging its collective bargaining duties.

The Adoption and Enforcement of the Brotherhood Law Limiting Applicants for Membership to Persons of the White Race Was, and Is, Consistent With the Known Law.

The date and the circumstances under which the members of the Brotherhood acted to restrict the membership of the Brotherhood to persons of the white race, are not without significance when weighing the question whether this law of the organization violates a legal right of the Negro firemen that is protected by the guarantees of the Fifth Amendment. We believe, for example, that the legal problem posed by the instant action is not the

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[6] Petitioners assert (page 9 of petition) that the Brotherhood is "a federally-certified labor union exercising federally-created bargaining power over excluded Negro employees."

For whatever bearing this circumstance may have on the instant action, the record contains no evidence to justify the statement that the Brotherhood has been certified by the National Mediation Board to be the representative of the firemen's craft on any of the southeastern carriers. Neither is it correct, in any practical sense, to say that the Brotherhood is exercising a "federally-created bargaining power" on these railroads. The record discloses that the Brotherhood negotiated its first collective agreements on behalf of the firemen's crafts on the Louisville & Nashville Railroad and on the Central of Georgia Railroad in 1919, and that these agreements have continued in effect down to the present time, though augmented from time to time by supplemental agreements containing additional employment rules and working conditions. (Tr. 514, 547.)

same problem that would be posed if the members of the Brotherhood, assembled in convention, had only yesterday resolved to exclude from membership all persons that are not members of the white race.

The law of the Brotherhood which limits its membership to persons of the white race was adopted by a convention of the Brotherhood as far back as the year 1881.[7] The Brotherhood is not just a labor union. It is organized as, and performs the normal functions of, a fraternal benefit society (Tr. 374). The Brotherhood also has an auxiliary organization known as the "Ladies Society of the Brotherhood of Locomotive Firemen and Enginemen." The members of the Ladies Society are the wives, mothers, daughters and sisters of the Brotherhood members. The membership of the Ladies Society numbers approximately 45,000 persons. The Brotherhood's lodges and the lodges of the Ladies Society frequently hold joint meetings and engage in concerted activities (Tr. 374, 449-450).

We assume that no one, not even the petitioners, would assert that this rule restricting the membership of the Brotherhood to persons of the white race was an unlawful condition when it was adopted by the Brotherhood convention about 1881. It, furthermore, seems certain that this qualification for membership did not conflict with any law at the time that the first Railway Labor Act was adopted in 1926.

As previously stated, there is no language to be found in the provisions of the Railway Labor Act as now in effect, or in any other statute enacted by the Congress, that either specifically affirms, or impliedly compels the conclusion, that organizations such as the railway brother-

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[7] The Brotherhood was organized December 1, 1873 (Tr. 372, 431). See Defendants' Exhibit "I."

hoods may not lawfully enforce restrictions on membership based upon racial differences.

If the Federal Constitution condemns this restriction on membership, it is not possible for the Brotherhood's legal counsel to know of this fact in advance of a decision by this Court, because this question has no apparent precedent among the decisions of this Court. In the meantime, or until a forthcoming convention of the Brotherhood repeals the requirement that applicants for membership must be of the white race, those responsible for the management of the Brotherhood are obliged by the common law of voluntary associations to enforce the laws of the organization according to their tenor and regardless of what may be their personal attitude toward any particular law.

There Is Insufficient Reason for By-Passing the Court of Appeals.

The explanation offered by petitioners for attempting to by-pass the Court of Appeals, Sixth Circuit, and come directly to this Court was to have the issues raised by the case of *Conley v. Gibson* (No. 7, October Term, 1957) and the instant case heard and determined at the same time.

Since this Court did not see fit to delay the argument in *Conley v. Gibson* as was requested by petitioners, it would appear that such justification as there might have been for by-passing the Court of Appeals no longer exists.

The Decision Below Is Not in Conflict With Any Applicable Decision of This Court.

The petitioners argue that since the District Court found that the Brotherhood engages in discriminatory practices affecting the petitioners' employment rights, the decision of the District Court refusing to order the Brotherhood to accept Negro firemen into membership is con-

trary to the decisions of this Court in the *Steele, Tunstall, Graham, Howard* and *Syres* cases (p. 7, Petition).

We pointed out in "Statement of the Case," *supra*, the reason why we believe the petitioners are clearly in error in stating that the District Court found that the Brotherhood is engaging in discriminatory tactics affecting the Negro firemen's employment rights. The only discriminatory action of which the Brotherhood is chargeable is the enforcement of its ancient rule limiting its membership to persons of the white race, and the consequent effect this has of preventing Negro firemen from participating in local lodge elections for local lodge officers held once each four years.

The lawfulness or unlawfulness of this alleged discrimination is the question that the instant action is supposed to answer, and the decisions in *Steele* and *Tunstall* and the other cases cited by the petitioners do not, insofar as the respondents understand them, have any direct bearing upon the extraordinary relief sought by the petitioners in the instant action.

As a matter of fact, it would seem that the doctrine of fair representation for all members of a craft, as laid down by the decisions in the *Steele* and *Tunstall* cases, was predicated in considerable part upon the unquestioned premise that the Railway Labor Act does *not* alter the right of railway labor organizations to prescribe as they see fit the conditions governing admittance to membership, as they have always done. We believe this is what Mr. Chief Justice Stone had in mind when he said:

> "So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. *While*

the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith." (323 U. S. 192, at 204.) (Emphasis ours.)

The Prayer for "Integration" in Labor Unions Should Be Addressed to Congress.

The third portion of petitioners' argument concerning the reasons why their petition should be granted appears to be centered about the contention that "integration in the field of labor would advance public acceptance of integration in other areas of community life" (p. 9, Petition).

No matter how wise and desirable total integration of the races in all phases of the national life may prove in time to be, it seems to the respondents that integration in certain phases of the national life, including "the field of labor," calls for the exercise of the legislative powers of the Government before the powers of the judicial branch may properly be invoked.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari does not fulfill those conditions specified in Rule 19 of this Court which would justify the granting of a writ.

Respectfully submitted,

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